



DARRELL EDWARDS

Claimant-Petitioner

V.

MARINE REPAIR SERVICES,
INCORPORATED

and

SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LIMITED

Employer/Carrier- Respondents

DATE ISSUED: Oct. 31, 2017

DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

John S. Austin (Austin Law Firm, PLLC), Raleigh, North Carolina, for claimant.

J. Hubert Wood, III (Wood Law Group, LLC), Charleston, South Carolina,
for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision and Denying Benefits (2014-LHC-00839) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C.

§921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been before the Board. Claimant filed a claim under the Act in 2012, alleging he sustained injuries on June 10, 2010, when his vehicle was struck from behind by a truck at or near an entrance gate to employer’s facility in South Carolina. Claimant also filed a civil tort suit against the owners of the truck that hit him. The parties to the tort suit settled the dispute for an undisclosed amount, and the court dismissed the tort action on April 29, 2013. Employer filed a motion for summary decision with the administrative law judge in September 2014, asserting that claimant did not comply with either the prior written approval requirement in Section 33(g)(1) or the notification requirement in Section 33(g)(2), such that his claim for benefits under the Act is barred. 33 U.S.C. §933(g)(1), (2). The administrative law judge granted employer’s motion, and claimant appealed.

On appeal, the Board stated that, as there was no dispute that claimant had notified employer of the third-party settlement, and as employer had not paid any benefits and the administrative law judge had not taken any action prior to the notice, Section 33(g)(2) was satisfied. The Board also held it was improper for the administrative law judge to grant employer’s motion for summary decision because it was unknown whether claimant’s tort settlement was for an amount greater than or less than his entitlement under the Act. Thus, there were unresolved genuine issues of material fact. The Board vacated the administrative law judge’s grant of summary decision and remanded the case for him to make the necessary findings of fact on the Section 33(g) issue or to resolve the claim on employer’s other defenses. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015).

Employer filed a motion for reconsideration, asserting it did not concede to the assertion in claimant’s brief that claimant had complied with the notice provision. The Board granted employer’s motion and modified its remand order to include the instruction that the administrative law judge also address, if necessary, whether claimant satisfied the Section 33(g)(2) notice provision. *Edwards v. Marine Repair Services, Inc.*, 50 BRBS 7 (2016).

On remand, the administrative law judge ordered claimant to produce a copy of the third-party settlement, or to file a protective order with a separate sealed copy of the third-party settlement for *in camera* proceedings, to permit him to comply with the Board’s remand order. Claimant filed a motion for protective order along with a copy of the third-party settlement in a sealed envelope. Emp. Br. at 4. Thereafter, employer submitted a comprehensive supplement to its motion for summary decision.¹ The

¹ Claimant submitted additional documentation to the administrative law judge, which primarily addressed his medical condition and expenses therefor, but no additional legal arguments on the Section 33(g) issue.

administrative law judge calculated claimant's lifetime entitlement under the Act, based on his average weekly wage and life expectancy, to be \$1,199,311.56, which he found exceeds the third-party settlement. As claimant entered into a third-party settlement for an amount less than his entitlement under the Act, the administrative law judge found that Section 33(g)(1) applies to bar claimant's benefits. Accordingly, he granted employer's motion for summary decision and denied the claim for disability and medical benefits. Decision and Order at 4-7. Claimant appeals, and employer responds, urging affirmance of the administrative law judge's decision.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Edwards*, 49 BRBS at 72; 29 C.F.R. §18.72. On remand, the administrative law judge addressed the parties' additional submissions and found there are no genuine issues of material fact with regard to Section 33(g), and employer is entitled to summary decision as a matter of law.

Claimant contends the administrative law judge erred in granting employer's motion and in denying benefits under Section 33(g) because he, claimant, "substantially complied with" Section 33(g)(2)'s notice requirement and, unless employer agrees that sufficient notice was given, there remains a genuine issue of material fact. Therefore, claimant asserts, Section 33(g)(2) does not bar benefits.² Because the administrative law judge did not address Section 33(g)(2) on remand, claimant contends he "failed to address the key issues upon which the case has been remanded: notice and compliance with Section 933(g)(2)." Cl. Br. at 8.

Employer urges the Board to affirm because the administrative law judge's decision complies with the remand orders. Employer asserts that the administrative law judge found that the third-party settlement was for an amount less than claimant's lifetime entitlement under the Act, claimant did not obtain employer's prior written approval of the third-party settlement, Section 33(g)(1) applies to bar claimant's benefits, and there are no unresolved questions of fact. Employer notes that claimant's appeal does not challenge these findings. We agree with employer.

² Claimant states that, shortly after the third-party settlement, he notified carrier's agent, thereby substantially complying with Section 33(g)(2), and employer should be held to have had constructive or actual notice of the third-party settlement. Claimant asserts that, as this notification satisfies Section 33(g)(2), Section 33(g) should not bar his "critical compensation benefits on a technical violation of the Act where [employer] suffers no prejudice." Cl. Br. at 7.

The Board's prior decisions discussed at length the law applicable to Section 33(g) inquiries and it need not be repeated here. *Edwards*, 49 BRBS 71; 50 BRBS 7. As employer asserts, claimant does not challenge the administrative law judge's findings with regard to claimant's average weekly wage or the amount of his lifetime compensation entitlement. Claimant also does not challenge the finding that his third-party settlement was for an amount less than his entitlement under the Act. Absent any challenge to those findings, they are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). As it is undisputed that claimant's third-party settlement was for an amount less than his entitlement under the Act, see *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994), claimant was required to obtain employer's written approval of the third-party settlement prior to executing it. 33 U.S.C. §933(g)(1); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007). It is undisputed that claimant did not do so. Therefore, regardless of whether claimant "substantially complied" with the Section 33(g)(2) notice requirement, claimant forfeits his disability and medical benefits under the Act.³ 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10, 15-16 (2002);⁴ 20 C.F.R. §702.281.

³ Explicit in the Board's remand order was that the administrative law judge need address the Section 33(g)(2) notice provision only if he found that claimant's third-party settlement was for an amount greater than or equal to his entitlement under the Act. *Edwards*, 50 BRBS 7. That claimant may have provided adequate notice is irrelevant if the Act requires more.

⁴ In *Esposito*, the Board held that, if the requirements of Section 33(g)(1) are applicable, non-compliance with Section 33(g)(1) of the Act results in the forfeiture of both disability compensation and medical benefits in accordance with Section 33(g)(2), pursuant to the plain language of Section 33(g)(2), the Supreme Court's discussion of Section 33(g)(2) in *Cowart*, and the plain language of the regulation at 20 C.F.R. §702.281(b). The Board rejected the claimant's assertion that the bar to medical benefits would not apply if he complied with either of the requirements, i.e., prior approval *or* notice to employer. *Esposito*, 36 BRBS at 15-16.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge